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No. 79-191

In the Supreme Court of the United States

OCTOBER TERM, 1978

MICHAEL PATRICK CLANCEY, PETITIONER

v.

CARL ALBERT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is reported at 600 F. 2d 237.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1979. The petition for a writ of certiorari was filed on August 6, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner's action challenging the constitutionality of House of Representatives Rule 43, paragraph 10, is moot.

STATEMENT

In January 1976, Andrew J. Hinshaw, then a member of the United States House of Representatives representing the 40th District of California, was convicted by a California state court on two counts of bribery. The conviction related to Hinshaw's conduct while serving as assessor for Orange County, California, prior to his first term in the 93d Congress. (Pet. App. 1).[1]

Following his conviction and while his appeal was pending, Representative Hinshaw refrained from voting in the House and from participating in committee business, (Pet. App.1-2), in voluntary compliance with House Rule 43, paragraph 10, which provides:

> A Member of the House of Representatives who has been convicted by a court of record for the commission of a crime for which a sentence of two or more years' imprisonment may be imposed should refrain from participation in the business of each committee of which he is a member and should refrain from voting on any question at a meeting of the House, or of the Committee of the Whole House, unless or until judicial or executive proceedings result in reinstatement of the presumption of his innocence or until he is reelected to the House after the date of such conviction.

Petitioner filed a "Complaint for Declaratory Relief" on March 25, 1976, alleging that Representative Hinshaw's abstention from voting and participation in other congressional business constituted taxation without representation of petitioner and other constituents of the 40th District (Pet. App. 2).

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[1]See H.R. Rep. No. 94-1477, 94th Cong., 2d Sess. 3 (1976).

The district court dismissed the action against defendants Carl Albert, then Speaker of the House, and John J. Flynt, Jr., Chairman of the House Committee on Standards of Official Conduct, on the ground that the action against them was barred by the Speech or Debate Clause, and it dismissed the action against the House of Representatives on the ground of sovereign immunity (Pet. App. 2 n. 2). Edmund L. Henshaw, Jr., Clerk of the House, and Representative Hinshaw remained as defendants. In June 1976, Representative Hinshaw was defeated in the primary election (Pet. App. 2). Thereafter, on April 6, 1977, the court dismissed the action against Clerk Henshaw as moot (Pet. 6). The court of appeals affirmed (Pet. App. 1-3).

ARGUMENT

The court of appeals correctly held that this case is moot, and there is no reason for further review.[2]

It is undisputed that Representative Hinshaw was not re-elected to Congress in 1976 and that petitioner is now fully represented in Congress. Petitioner contends that his claim is not moot, however, on the ground that the issue presented is "capable of repetition, yet evading review," an exception to the mootness doctrine first recognized by this Court in *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). In that case, the Court held that its jurisdiction to determine the validity of an ICC order was not defeated even though the order had expired by the time the case reached the Court. The rationale for permitting review was that the order in question, and

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[2]We note that on June 2, 1976, petitioner attempted to invoke this Court's original jurisdiction by filing a Petition for Writs of Prohibition and Mandamus in which he contended that this action would be moot if it were not decided prior to the November 1976 general election. This Court denied leave to file the petition. *Clancey* v. *United States House of Representatives*, 429 U.S. 813 (1976).

similar orders, were of such short duration that they would virtually always expire before litigation challenging their validity could be completed and that the same party was likely to be affected by the same type of short duration orders in the future.[3]

But the exception to the jurisdictional "case or controversy" requirement recognized in *Southern Pacific* is a narrow one. Contrary to petitioner's apparent assumption, it does not apply whenever a plaintiff contends that a particular legal dispute may recur. Rather, as the Court recently explained in *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) citing *Sosna* v. *Iowa*, 419 U.S. 393 (1975):

> [I]n the absence of a class action, the "capable of repetition, yet evading review" doctrine [is] limited to the situation where two elements [combine]: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.

[3]The "capable of repetition, yet evading review" concept has been applied in various contexts since *Southern Pacific Terminal Co.* v. *ICC*, *supra*. See, *e.g.*, *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976) (challenge to restrictive order on pretrial publicity in criminal proceedings not mooted by termination of the order by its own terms); *Sosna* v. *Iowa*, 419 U.S. 393 (1975) (challenge to durational residency requirement for divorce not moot in a class action although requirement was satisfied by named plaintiff prior to Court's review); *Roe* v. *Wade*, 410 U.S. 113 (1973) (challenge to anti-abortion statute not mooted by natural termination of pregnancy); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972) (challenge to residency requirement for voter registration not moot in a class action although requirement was satisfied by named plaintiff before Court's review); *Moore* v. *Ogilvie*, 394 U.S. 814 (1969) (challenge to state's electoral candidate nominating procedure not moot even though election was completed prior to Court's review).

This case is not a class action, and the court of appeals correctly observed that "[t]he chance that appellant Clancey will again reside in a district whose elected representative is convicted of a crime while serving seems too remote to amount to a 'reasonable expectation' that the House Rule will again affect Clancey's representation in Congress" (Pet. App. 3). There is no reason to assume that future representatives from California's 40th District are likely to be convicted of crimes while in office.[4] Thus, petitioner himself is no longer injured by the allegedly wrongful conduct, and the likelihood that his congressional representative again will be convicted while serving and will voluntarily comply with the Rule is simply too speculative to meet the "capable of repetition" standard. Cf. *County of Los Angeles* v. *Davis*, No. 77-1553 (March 27, 1979).

Moreover, it would be inappropriate for a court to assume, as a basis for its exercise of jurisdiction, that a present or future Member of Congress from a particular district will be convicted of a serious crime while in office—just as it would be inappropriate to base jurisdiction on the assumption that a particular individual will engage in criminal conduct in the future.

[4]House Rule 43 does not apply if the representative is elected or re-elected after the conviction.

Moreover, Rule 43 is not self-executing. The Rule, by its terms, simply states a policy convicted House members "should" observe, and with which Representative Hinshaw chose to comply. As the debate on the Rule indicates, the House might discipline a member for breach of the stated policy, but such measures would not be automatic, and the House could waive the policy in any circumstances in which the public interest would thereby be served. 121 Cong. Rec. 10339-10345 (1975). See also 3 *Deschler's Precedents* of *the United States House of Representatives*, ch. 12, §15 (1977). In any event, petitioner's claim on the merits is insubstantial. The Constitution (Art. I, §5, cl.2) provides that "[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior and, with the Concurrence of two thirds, expel a Member."

Finally, although the court of appeals rested its decision solely on petitioner's failure to satisfy the "capable of repetition" prong of the *Southern Pacific* exception to the mootness doctrine, it is also clear that this case does not meet the "evading review" requirement. Given available means of expediting litigation, it cannot reasonably be contended that the purely legal issue presented by petitioner would inevitably evade review simply because the disability imposed upon a House member under the Rule is limited to two years. Cf. *DeFunis* v. *Odegaard*, 416 U.S. 312, 319 (1974).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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